

WATER/LTR**PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA****WATER DIVISION
Water Advisory Branch****RESOLUTION NO. W-4287
August 23, 2001****R E S O L U T I O N****(RES. W-4287) GREAT OAKS WATER COMPANY (GOWC).
ORDER AUTHORIZING A SERVICE AREA EXTENSION AND
UPDATE OF SERVICE AREA MAP TO REFLECT CLAIMED-
RIGHT AREAS OF SERVICE.**

SUMMARY

By Advice Letter (AL) No. 151, filed on May 23, 2001, GOWC requests revision of its service area map to include a new customer in an area contiguous to its presently certificated service area in Santa Clara County. The area requested in AL No. 151 is the site planned for the 600 megawatt (MW) electric generation plant known as the Metcalf Energy Center (MEC) project ¹. The MEC project site lies between two areas already being served and presently certificated by GOWC.

¹ The MEC project is a nominal 600 MW, natural gas-fired, combined cycle electric generation facility. Additional facilities proposed as part of this project include an administration building with control room, storage tanks, parking area, water treatment building, a switchgear building and a warehouse/maintenance shop. MEC requires approximately 2.9 to 5.8 million gallons a day (mgd) of recycled water that will be used for cooling purposes, and approximately 5 mgd of potable water for peak demand. The MEC is a development of San Jose-based Calpine Corporation, one of the nation's leading independent providers of electric power, and Bechtel Enterprises Holdings, Inc., the development, financing and ownership affiliate of the Bechtel organization, one of the world's premier engineering and construction companies. The MEC site is planned for a 20-acre parcel of land located in the area roughly bounded by Tulare Hill, Monterey Highway, Blanchard Road, and Santa Teresa Boulevard.

An objection letter was received on June 6, 2001, from the City of San Jose (CSJ). The Water Division (Staff) investigated CSJ's concerns and determined that there was no basis for the Commission to deny GOWC's request.

During its investigation, Staff discovered that there are additional areas being served by GOWC that are not presently certificated and reflected in GOWC's current service area map. Neither CSJ's Municipal Water System (Municipal) nor the San Jose Water Company (SJWC) currently serve these areas. GOWC is seeking recognition by the Commission to serve these areas.

This resolution hereby grants GOWC the authority to extend its service area to include the MEC project site as proposed in AL No. 151. This resolution also orders GOWC to file service area maps to reflect the additional areas already being served.

BACKGROUND

GOWC's Filings

GOWC first sought a service area extension for the MEC project through its AL No. 149, filed in 2000 ², and again in its AL No. 150, filed in 2001 ³. GOWC is again attempting to include the MEC project in its service area for the third time. The current filing, AL No. 151, is in accordance with General Order (G.O.) 96-A and G.O. 103 and was deemed complete for filing by the Staff on May 23, 2001.

² GOWC's AL No. 149 was to include the MEC project in its service area in 2000. In November 2000, the CSJ City Council was advised to deny the MEC project on the basis that the project was incompatible with the San Jose 2020 General Plan designation for the entire area [***Metcalf Energy Center Advisory Committee (MECAC) Report***, dated November 9, 2000]. Because the CSJ City Council opposed the MEC project and refused to approve it, GOWC withdrew AL No. 149.

³ The California Energy Commission (CEC) indicated that it could over-ride CSJ's City Council decision denying the MEC project. As a result, CSJ agreed to allow the MEC project to proceed. In a second effort to add the MEC project to its service territory, GOWC filed AL No. 150. Staff rejected AL No. 150 due, in part, to missing information and an illegible Water Supply Questionnaire.

GOWC, in AL No. 151, has proposed initially to provide the MEC project with potable water for domestic and industrial (e.g. plant cooling) uses and to provide recycled water services once that service is available for the area. Under GOWC's proposal, industrial uses would eventually be converted from potable to recycled water after the recycled water service becomes effective.

As part of AL No. 151, GOWC submitted a Water Supply Questionnaire (WSQ) that indicated GOWC is able to meet the supply requirements of the current customers, the supply requirements of the MEC project (domestic and industrial), and the fire flow requirements during a maximum demand day. GOWC estimated the MEC project's average daily demand for water uses (domestic and industrial) to be 2,430 gallons per minute.

CSJ's Concerns

An objection letter was received from CSJ on June 6, 2001. The letter stated that it was protesting AL No. 151 on the same grounds it had protested GOWC's AL No. 149 ⁴. The letter submitted failed to qualify as a protest letter because it did not: (1) state the facts on which the protest was based, (2) state the effect that approval of the advice letter might have on CSJ, and (3) did not state the reasons CSJ believes the advice letter, in whole or in part, is not justified ⁵.

What CSJ's original letter, dated May 5, 2000, did state was that: (1) CSJ's "first problem" was that GOWC's service area map was unclear as to how the expansion area relates to GOWC's present certificated area, (2) CSJ is

⁴ CSJ merely referenced and attached a copy of its letter, dated May 5, 2000, regarding AL No. 149. CSJ did not make any attempt to revise its concerns from GOWC's AL No. 149 to AL No. 151 (some concerns were outdated and made moot because GOWC's AL No. 151 corrected much of CSJ's concerns). CSJ has sent letters to Staff, requesting that all correspondence between the Commission and GOWC regarding the MEC project filing be supplied to them, despite the fact that CSJ is a recipient of all advice letter filings.

⁵ Standard wording in advice letters and customer notices now states that all protest letters must contain these three points. By placing this language in advice letters and customer notices, Staff is now able to clearly discern between protest letters and comment letters, which facilitates Staff's preparation of resolutions.

“concerned” that GOWC may be allowed to serve the proposed MEC project when CSJ has concerns relating to potable, non-potable water, and sewer service, (3) GOWC does not have a franchise from CSJ to serve non-potable water, and (4) CSJ would be “interested” in any information regarding GOWC’s financing the construction of any proposed infrastructure.

CSJ’s first concern is over GOWC’s service area map and how the expansion relates to GOWC’s present certificated area. The map submitted with AL No. 151 clearly shows the relationship between the requested MEC project and GOWC’s existing service area⁶.

CSJ’s second concern is over GOWC being allowed to serve the MEC project while CSJ has issues over potable, non-potable, and sewer service. Staff’s investigation has revealed that these issues are no longer valid. The supporting documentation provided with CSJ’s letter indicated that it was CSJ, not GOWC, that did not have the plans to provide sufficient potable water to meet the MEC project’s cooling needs.

CSJ’s third concern is regarding GOWC not having a franchise from CSJ to offer recycled water. GOWC indicates clearly in AL No. 151 that they are not able at this time to offer recycled water, but will be taking the necessary steps to provide

⁶ In D.85-06-022 (Re Great Oaks Water Company (1985) 18 CPUC 22, 27-29), the Commission addressed service areas when it ruled that defining “service territory and determining who is within and without is not simply a matter of where a utility drew a line on a map, and the utility’s filed map is only a starting point which the Commission will use to establish the extent of dedication (Parker v. Apple Valley, supra) (pg. 16 & 17)” and that the “Commission has exclusive jurisdiction to determine the extent of a fixed utility’s dedication of service (Parker v. Apple Valley, supra), and in making such determinations we are guided by the rule of reasonableness (Edwards, supra).” In addition, the Commission ruled that the “Legislature, using its plenary power, has given to this Commission the exclusive power to establish service areas for privately owned utilities serving the general public and to approve the tariffs of such privately owned utilities (PU Code § 486-495, 1001-1006, and 2709). A city has no power to prevent a state regulated utility from commencing its business or extending its plant to additional city customers (Pac. Tel. & Tel. Co. v. Los Angeles (1955) 44 C 2d 272).” (*Id.* at p. 29.)

recycled water in the future. CSJ's concern is not valid as GOWC is planning on providing potable water to support the projected needs.

CSJ's fourth concern is not a concern but simply a statement that CSJ would be "interested" in information regarding GOWC's financing the construction of any proposed infrastructure. AL No. 151 is not the vehicle to obtain this information, as it is merely a filing that shows whether or not GOWC has sufficient water supplies for the MEC project as well as its existing customers.

The Commission notes that more than a year has passed since the above described "concerns" were brought forward. It appears that CSJ has made no effort to further address or alleviate its concerns.

Staff's Investigation

As part of its investigation, Staff met with the Municipal's senior civil engineer, to discuss additional concerns that he had with GOWC's filing and the WSQ. These concerns included such items as fire flow requirements, pressure zones within GOWC's service area, assumptions for water flow modeling, and construction in conflicting service areas. Staff determined that some of these concerns were valid. During that meeting, Staff was informed that CSJ's concerns surrounding non-potable water and sewer services had been resolved and were no longer an issue. Staff then met with GOWC to discuss all of these concerns.

Following these meetings, GOWC has submitted a revised WSQ that indicates GOWC does indeed have sufficient supply available to meet all of the requirements.

Based upon the revised WSQ, Staff has determined that GOWC does indeed have sufficient water supplies available to supply the MEC project without impacting its existing customers. Based on these facts, CSJ did not provide sufficient evidence to merit the rejection of GOWC's filing.

While meeting with GOWC, Staff became aware that there were certain areas currently being served by GOWC, which are not reflected in GOWC's authorized service area map. At this time, GOWC seeks Commission recognition to serve these areas. In D.96-02-013 (Ben I. Canales v. Toro Water Service Company (1996) 64 CPUC 2d 565, 567) the Commission previously held that:

... the Commission repeatedly has adhered to the general policy of protecting a public utility's service territory so long as the utility has properly discharged its duties to the public. When a public utility voluntarily has determined to extend its service availability into an area heretofore outside its declared service territory boundaries, the utility concurrently must accept an obligation to serve all customers in that area as it has then dedicated its service to said new area (Di Liberto v. Park Water Co. (1965) 54 CPUC 639).

The areas that GOWC seeks to add include the properties in the Calero Lake Estates area, individual properties around the Calero Lake Estates area, the Santa Teresa County Park and Golf Club, several properties along Piercy Road, and Hellyer Park. In addition, GOWC also serves an area currently reflected as an excluded island on its service area map. This area includes an IBM property and a smaller area being developed by a company called Equinox. With respect to islands within a service area, the Commission in D.96-02-013 (Ben I. Canales v. Toro Water Service Company (1996) 64 CPUC 2d 565, 569) has held that:

... being in accord with Radisavljevic and Bakum v. Cal. Am Water Co. ((1979) D. 90262 issued May 8, 1979), which provided that when service is extended into a new area the area must not be gerrymandered to exclude potential customers and should be extended to new boundaries which are logically and naturally defined, avoiding unserved enclaves, peninsulas, or islands.

While it is noted that GOWC should have filed for service area extensions at the time it began serving each of these areas, GOWC indicated a reluctance to do so in light of the history between CSJ and GOWC ⁷. The Commission cannot condone the lack of action by GOWC and must now require that GOWC update its system area map to reflect the addition of these service areas already being served.

⁷ The Commission has previously addressed service area extension filings made by GOWC and protested by CSJ. In each case the Commission found in favor of GOWC. These decisions included D.85-06-022 (Re Great Oaks Water Company (1985) 18 CPUC 2d 22) and D. 91-02-039 (Re Great Oaks Water Company (1991) 39 CPUC 2d 339).

The present service area of GOWC became effective on July 5, 1985 and September 17, 1993, pursuant to D.85-06-022 and D.91-02-039, respectively. GOWC presently serves about 20,400 customers in Southeast San Jose, Santa Clara County.

NOTICE AND PROTESTS

GOWC has given notice of its request by mailing copies of the advice letter to CSJ, the SJWC, and the Local Area Formation Commission.

An objection letter was received on June 6, 2001 from CSJ regarding AL No. 151. GOWC responded to CSJ's objection letter on June 9, 2001. The objections raised in CSJ's letter are discussed in this resolution and do not provide sufficient evidence to justify the rejection of AL No. 151.

DISCUSSION

Regulated water utilities are required by the Commission's General Order (G.O.) 103, ***Rules Governing Water Service Including Minimum Standards For Design and Construction*** (effective March 9, 1994), to design their water systems to deliver adequately, dependably, and safely, the total water requirements of all customers under maximum consumption as well as provide, for a sustained period of at least two hours, the fire flow requirements of the appropriate local governmental agency (or, if no local governmental agency exists, the minimum flow requirements outlined in G.O. 103). These design conditions must be met while maintaining normal operating pressures.

When a utility extends or modifies its water system in order to serve new customer(s)/subdivision(s), it is required to meet the minimum standards for design and construction outlined in G.O. 103. In order to verify that the system can meet these standards, the utility must submit a WSQ to the Water Division for review and approval⁸. The burden of proof rests solely with the utility.

⁸ A WSQ is a document used by Staff to determine that sufficient water supplies are available to meet: (1) existing customer demand, (2) the proposed customer(s)/subdivision(s), and (3) fire flow requirements for all customers (existing and proposed). The WSQ contains data, calculations, and supporting information

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Staff will normally encounter a WSQ either with an advice letter requesting a Department of Real Estate approval letter (e.g. a new subdivision being developed within the utility's service area) or with an advice letter requesting a contiguous service area extension (to extend its service area to incorporate a new customer or a subdivision). Standard filings of this type do not require discussion of facilities, but merely proof that sufficient water is available to meet demand and fire flow. In the case of GOWC, AL No. 151 is a standard filing for a contiguous service area extension.

AL No. 151, as submitted and revised, shows that GOWC has met the requirement for such a filing. While CSJ and the Municipal have raised concerns, Staff's investigation has resulted in the conclusion that GOWC should not be denied its request to expand its service area to include the MEC project.

The Commission's record clearly shows that historically, GOWC, CSJ, and the Municipal have competed for new service territory. Commission decisions, such as D.85-06-022 (Re Great Oaks Water Company (1985) 18 CPUC 2d 22) and D.91-02-039 (Re Great Oaks Water Company (1991) 39 CPUC 2d 339)⁹, show that the Commission previously has debated territorial issues, has expended significant resources and efforts to consider all sides of the issues, and has repeatedly defined the authorizing decision as supported by good public policy. Although this Commission has made it clear that it considered the public interest when making these decisions, the Commission has no jurisdiction over CSJ. We note that, in every previous case, CSJ and its Municipal have ignored this Commission's determinations. Staff has no reason to believe this resolution will be treated any differently. The Commission could deny this advice letter filing and require GOWC to request its extension by Application. This process, however, would not add materially to the present record. The Commission has effectively reviewed and resolved these issues twice in the past, finding each time for GOWC.

regarding water supply and water demands. The WSQ is certified and verified by the utility under penalty of perjury.

⁹ See Attachment A.

The Commission has faced similar situations of territorial disputes in the cases of Bakman Water Company (Bakman) versus the City of Fresno (Fresno) ¹⁰ and McCanna Ranch Water Company (McCanna) versus Riverside County Eastern Municipal Water District (District) ¹¹. In these cases, the Commission has also expended significant resources and ultimately has ruled in favor of the regulated utilities. In both cases, the Commission also has expressed concern that the city entity might pursue its power to prevent the utility from commencing a state-authorized operation.

The Commission, in Oro Electric Corporation (1913) 2 CRRC 748, stated:

“A wise public policy demands that utilities which are doing their full duty to the public shall be treated with fairness and justice and liberality, and they shall receive such protection to their investments as they may deserve, subject always to the contingency that if another utility can, by reason of superior natural advantages or patented processes or other means, give to the public a service as good as the existing utility, at rates materially less, the interests of the public must be deemed paramount and the new utility must be given an opportunity to serve the public.”

As the Commission noted in D.91-02-039 (Re Great Oaks Water Company (1991) 39 CPUC 2d 339, 343), "the order does not affect other municipal powers to frustrate or interfere with the prevailing utility's plans to serve the territory." There is every indication that CSJ plans to do just that by denying MEC the necessary building permits unless MEC agrees to accept water service from the Municipal ¹². To the extent that CSJ preempts customer choice and bestows the

¹⁰ See D.90313 (Application of Bakman Water Company (1979) 1 CPUC 2d 364 and D.92606 (Bakman Water Company (1981) 5 CPUC 2d 359.

¹¹ See Application of McCanna Ranch Water Company, D.99-08-016 (1999) slip opinion.

¹² There exists a proposed “cooperation agreement” between CSJ and the MEC project. Preliminary details of that agreement indicate that the MEC project would be allowed to proceed if CSJ was to provide all city services, included potable, non-potable water, and sewer services. If this agreement is executed, CSJ would effectively eliminate GOWC’s ability to serve the MEC project. The MEC project management has indicated

Footnote continued on next page

service territory on its Municipal, without the benefit of competition, its actions are contrary to Commission policy. GOWC should be allowed the opportunity to attempt to provide service to the MEC project at MEC's request. There is no reason to preclude GOWC from doing so.

The issues of territorial disputes in the Coyote Valley that have plagued GOWC are beyond this Commission's power to resolve; they must be argued in court. Should GOWC pursue litigation of its competing interest in serving MEC, costs associated with such litigation may not be passed on to GOWC's ratepayers. The Commission has no way of evaluating the reasonableness of the utility's choice to pursue litigation as a means of securing the service opportunity.

GOWC's service is satisfactory. There are no Commission orders requiring system improvement, nor are there service problems requiring corrective action. GOWC currently complies with all Commission orders and regulations.

The Consumer Affairs Branch has not received any complaints against GOWC during the last twelve months.

COMMENTS

Public Utilities Code section 311(g)(1) provides that this resolution must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission.

The 30-day comment period for the draft of this resolution was neither waived nor reduced. The resolution was sent to GOWC, CSJ, and the Municipal for comments on August 8, 2001.

FINDINGS

THE COMMISSION FINDS, after investigation by the Branch, that:

to Staff that, notwithstanding the pending agreement with CSJ, GOWC is the preferred provider because its rates and connection costs are less expensive.

1. The service area extension as filed in AL No. 151 is reasonable and should be allowed.
2. GOWC does have a claimed right to serve the areas mentioned in this resolution but not reflected in GOWC's service area map. The areas that GOWC seeks to add include the properties in the Calero Lake Estates area, individual properties around the Calero Lake Estates area, the Santa Teresa County Park and Golf Club, several properties along Piercy Road, Hellyer Park, and an area currently reflected as an excluded island on its service area map.

THEREFORE IT IS ORDERED THAT:

1. Great Oaks Water Company is authorized to revise its service area map to include the area filed in AL. No. 151.
2. Great Oaks Water Company is authorized to revise its service area map to include the areas where there exists a right to serve, but are not yet reflected in GOWC's service area map. These areas include the properties in the Calero Lake Estates area, individual properties around the Calero Lake Estates area, the Santa Teresa County Park and Golf Club, several properties along Piercy Road, Hellyer Park, and an area currently reflected as an excluded island on its service area map.
3. The effective date of Great Oaks Water Company's revised service area map shall be the date of this resolution.
4. This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on September 20, 2001; the following Commissioners voting favorably thereon:

WESLEY M. FRANKLIN
Executive Director

ATTACHMENT A

Excerpts from

D.91-02-039 (Re Great Oaks Water Company (1991) 39 CPUC 2d 339, 344-345)

“This is not the first boundary dispute between GOWC and City. *GOWC (San Jose)*, 18 CPUC 2d 22 (1985), concerned another City protest to a GOWC advice letter extension. In that case, the City had originally refused to allow development of another disputed area under the theory that the area would not be ready for development until 1990. It so informed the Commission in protesting GOWC’s first Advice Letter.

Subsequently, a major industrial firm proposed to build a new \$33 million laboratory facility in the vicinity. The City then decided to allow development; it issued the approval for early development subject to what the *GOWC (San Jose)* decision called a “strange condition.” Even though GOWC service areas surrounded the site on three sides and even though it was ready, willing and able to serve, City required the customer to develop its own water supply. This condition was clearly intended to preserve the City’s ultimate claim to the service territory, even though its nearest water facilities were, at the time, ten miles from the lab.

The Customer was thus required to drill through 600 feet of solid rock. Despite an expenditure of \$1.5 million, it obtained only 400 gpm of poor quality water. When this source began to fail, the customer again approached GOWC. The City opposed a low cost, straightforward solution proposed by GOWC, instead insisting on a connection with a remote GOWC facility which required the construction of 9,000 feet of 6-inch main up one side of a hill and down the other. (This solution not only wasted capital, it wasted energy and increased pumping costs.)

When GOWC later filed a second advice letter to include the customer’s lab in its tariffed area, the City protested, claiming that it planned to serve the area itself. It proposed to finance the necessary utility plant by forming an assessment district to compel existing landowners to pay for the improvements. (Apparently, the assessment would give the lab’s owner no credit for the amounts expended on the well or the main project in determining its assessment.) The Commission’s decision called this tract an “...area denied direct service but required to take indirect service with extra and wasteful pumping costs added, all at the choice or whim of [City]...”

In comparing GOWC and City, the decision remarked that the former “...is strictly a water company and not a political entity with leverage over prospective customers; customers are not at risk on issues which should not be relevant to the provision of water service...”

The decision found in GOWC’s favor.

There was another dispute which culminated in an action by the city to fix the damages caused by system paralleling. This action was ended by a request by City to dismiss. (D.87-11-045 in A.83-07-028.)”